

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1534

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

MORTON I. BAUM,

Plaintiff-Appellant.

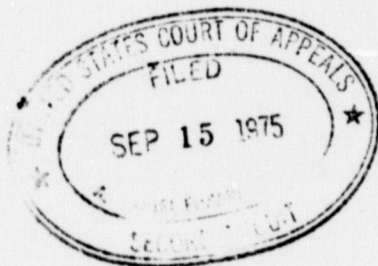
vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

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74-1534

In The
United States Court of Appeals
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MORTON I. BAUM,

Plaintiff-Appellant.

VS.

UNITED STATES OF AMERICA.

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from the order and decision of Hon. Lee P. Gagliardi, dated May 27, 1975, granting the defendant's motion dismissing plaintiff's complaint, after reargument which had been sought by all parties after Judge Gagliardi's original decision dated April 2, 1974.

By notice of motion dated March 9, 1973, the defendant moved to dismiss plaintiff's complaint in an action seeking recovery of surplus monies held by the defendant after an Internal Revenue Sale held to satisfy certain federal tax liens. The motion to dismiss was not supported by any affidavits, but was accompanied by a memorandum of law. The plaintiff opposed the motion to dismiss by affidavit sworn to the 16th day of March, 1973. Thereafter, by reply affidavit of William R. Bronner, Assistant United States Attorney, sworn to the 21st day of March, 1973, the defendant sought to convert the motion to dismiss into a motion for summary judgment under the provisions of Rule 9(g) of the General Rules and Rule 56(b) of the Federal Rules and renewed the application to dismiss the complaint.

The plaintiff joined in the application and asked for summary judgment in his favor based upon the complaint and all of the submitted affidavits.

Robert Crank and John Sibirtzeff, d/b/a Mid-Hudson Painting & Decorating Co., by notice of motion dated February 15, 1973, sought leave to intervene in the action brought by the plaintiff, although the time for them to commence an action on their own behalf as required by Section 6532(c)(1)

of the Internal Revenue Code of 1954, as amended, had expired. Said moving papers were not accompanied by any proposed pleading.

By stipulation filed July 24, 1973, (Appendix Page 74a) all facts necessary for a determination of the motions were agreed upon.

The plaintiff and the defendant both sought a determination of whether an execution sale of real property held by the Orange County Sheriff before the Internal Revenue Service sealed bid sale of the same real property was valid when same was held after the posting of notice of seizure by the Internal Revenue Service. The motions also sought a determination as to the disposition of the surplus monies arising from the Internal Revenue Service sealed bid sale and a decision on the motion to intervene by Mid-Hudson Painting and Decorating Co.

Although Judge Gagliardi's Memorandum Decision filed April 2, 1974, recognized that the plaintiff had standing and that the Sheriff's Sale was valid, he determined that the Internal Revenue Service did not receive adequate notice pursuant to 26 U.S.C. Section 7425(b) and (c) of the sale of real property pursuant to execution held by the Orange County Sheriff, and thus the federal tax liens filed subsequent to the judgment that was the basis of the execution sale were not extinguished by same. The decision made no determination of the motion to intervene or any disposition of the surplus monies arising from the Internal Revenue Service sealed bid sale.

After timely filing a notice of appeal, the plaintiff moved for reargument before Judge Gagliardi, in which motion the defendant joined. By said motion to reargue, the plaintiff sought clarification as to which federal tax liens the defendant had not received adequate notice, so that the amount of the surplus proceeds to which the plaintiff would be entitled after provision for those federal tax liens could be calculated. The defendant joined in the application for reargument seeking a determination of summary judgment in its favor, but not on the basis of inadequate notice of the Sheriff's Sale, but rather upon its claim of invalidity of the Sheriff's Sale. The United States Attorney has conceded that if the Sheriff's Sale is held valid, the plaintiff would be entitled to the surplus proceeds remaining after payment of the first three federal tax liens (Appendix Page 89a).

The plaintiff has contended, and contends on this appeal, that the Sheriff's Sale was held in accordance with applicable state and federal law, and was in all respects valid, and that as owner of the equity of redemption he is entitled to the surplus proceeds remaining after payment of the first federal tax lien; the others having been extinguished by the Sheriff's Sale.

FACTS

By stipulation filed July 24, 1973, the parties agreed to the following facts for the purposes of a motion to dismiss and for summary judgment.

The action was brought to recover surplus monies arising after sale by I.R.S. of seized real property owned by J. W. Construction Corp., pursuant to the provisions of 26 U.S.C.A. (I.R.C. 1954) Sections 6335, 7425 (b) and 7426(a)(2), for non-payment of certain federal taxes.

The action was commenced by the filing of the complaint and issuance of the summons by the Clerk of the Court on September 14, 1972. Defendant, by stipulation, extended its time to answer or otherwise move to March 5, 1973. An answer has not been served.

Representatives of I.R.S. posted a notice of seizure at the real property of J.W. Construction Corp., located on Route 6, R.D.#3, Town of Greenville, Orange County, New York, on September 9, 1971. This property was later sold by I.R.S. at an administrative sealed bid sale held on March 17, 1972, after publication of notice thereof dated February 17, 1972. The property was purchased by a person named Wilkin at a price of \$31,010.00.

Defendant claimed federal tax liens, and will eventually account for actual amounts affecting the premises as follows:

PERIOD ENDING	DATE OF ASSESSMENT	PRINCIPAL, INTEREST AND PENALTIES
9/30/70	12/11/70	\$ 4,277.11
12/31/70	5/14/71	4,074.30
6/30/71	11/16/71	7,394.53
9/30/71	1/28/72	9,151.16
		<u>\$24,897.10</u>

On July 26, 1971, a judgment was entered against J. W. Construction Corp. and Jack Waschitz in favor of Mid-Hudson Painting and Decorating Co. in the amount of \$7,585.38. This judgment was entered in the Supreme Court, State of New York, and was docketed in the Orange County Clerk's Office.

Thereafter, Mid-Hudson issued an execution dated August 30, 1971, on the judgment and delivered it to the Orange County Sheriff. The Orange County Sheriff posted his notice of levy on the real property of J. W. Construction Corp. on October 4, 1971. Pursuant to notice of sale dated January 4, 1972, the Sheriff advertised for sale at public auction, on March 7, 1972, the same premises to be sold by I.R.S. on March 17, 1972, for the unpaid federal tax liens.

Prior to the Sheriff's sale held on March 7, 1972, the Orange County Sheriff posted a Notice of Sale at three places in the Town of Greenville and three places in the Town of Goshen, all six being posted on January 18, 1972. In addition, a copy of the Notice of Sale was published in the Middletown Times-Herald Record, a newspaper having general circulation in Orange County and its surrounding vicinity, in issues of January 7, 21, February 4, and 18 of 1972. A copy of the Notice of Sale was

served by certified mail; return receipt requested, on State Tax Commission, Mid-Hudson Painting and Decorating Co., Charles G. Smith Assoc., Inc., National Union Bank of Monticello, Public Service Mutual Insurance Company, Empire National Bank, Murphy Door Bed Co., Inc., Industrial Commissioner of the State of New York, Mid-Hudson Automatic Sprinkler Co., Inc., and Hatfield Bros., Inc. A copy of the Notice of Sale, certified mail, return receipt requested, was not served upon J.R.S. or its delegate. However, plaintiff contends that actual notice of the proposed Sheriff's sale was received by authorized representatives of I.R.S. at least twenty-five days prior to the date of sale. Defendant admits actual notice but does not recall whether or not notice was acquired at least twenty-five days prior to the sale.

Plaintiff bid in the property and interest of J. W. Construction Corp. at the Orange County Sheriff's Sale held on March 7, 1972, and later received a Sheriff's Deed dated May 18, 1972. Representatives of the I.R.S. attended the public auction held by the Orange County Sheriff and announced that the property being sold at the Sheriff's sale was subject to federal tax liens and prior levy by I.R.S. and sealed bid sale to be held on March 17, 1972, 10 days later. The Sheriff then completed the auction with the plaintiff being the successful bidder.

The records maintained by the Orange County Clerk indicate the following for the period commencing September 16, 1968 and ending March 6, 1972.

1.

James E. Walker & William
V. Walker

to

J. W. Construction Corp.

Conveys: Encumbered premises.

Deed

Dated: 9/16/68

Rec'd: 9/17/68

Liber: 1803, p. 993

2.

J.W. Construction Corp.

to

James E. Walker & William
V. Walker

Secures: Encumbered premises.

2a.

Mortgage

Dated: 9/16/68

Rec'd: 9/17/68

Liber: 1519, p. 782

Amount: \$10,000.00

U. S. A.

v.

J. W. Construction Corp..

Federal Tax Lien

Amount: \$8,082.76

Filed: 4/26/71

(Discharged)

3.

Fallsburg Iron Works, Inc.
et al.

v.

J. W. Construction Corp.

Notice of Pendency

Amount: \$19,829.26

Dated: 4/28/71

Filed: 4/29/71

Index No.: 1306/71

4.

State Tax Commission

v.

J. W. Construction Corp.

N.Y.S. Tax Warrant & Lien

Amount: \$6,465.55

Filed: 5/12/71

See: Corrected Lien #4111

5.

U. S. A.

v.

J. W. Construction Corp.

Federal Tax Lien

Collector's serial #14691

Amount: \$9,092.98

File: 4049

Filed: 6/3/71

6.
Mid-Hudson Painting &
Decorating Co.
v.
J. W. Construction Corp.
Judgment
Amount: \$7,858.38
Entered: 7/26/71
7.
Chas. G. Smith Associates, Inc.
v.
J. W. Construction Corp. &
Jack Waschitz
Judgment
Amount: \$5,292.21
Entered: 8/3/71
8.
State Tax Commission
v.
J. W. Construction Corp.
N.Y.S. Tax Warrant & Lien
Amount \$731.88
Entered: 8/12/71
9.
U. S. A.
v.
J. W. Construction Corp.
Federal Tax Lien
Collector's Serial #15417
Amount: \$3,930.05
File No.: 4120
Filed: 8/26/71
10.
National Union Bank of
Monticello, N.Y.
v,
J. W. Construction Corp. &
Jack Waschitz
Judgment
Amount: \$18,297.05
Entered: 9/16/71
11.
Public Service Mutual Inc. Co.
v.
J. W. Construc;ction Corp.
Judgment
Amount: \$2,352.89
12.
Murphy Door Bed Co., Inc.
v.
J. W. Construction Corp.
Judgment
Amount: \$1,664.32
13.
Industrial Commissioner
v.
J. W. Construction Corp.
N.Y.S. Tax Warrant & Lien
Amount: \$782.70
Filed: 12/16.71

14.
Mid-Hudson Automatic Sprinkler
Co., Inc.
v.
J. W. Construction Corp.
Judgment
Amount: \$1,937.34
Entered: 12/29/71
15.
U. S. A.
v.
J. W. Construction Corp.
Federal Tax Lien
Collector's Serial #16767
Amount: \$2,807.90
File: #4229
Filed: 12/31/71
16.
Hatfield Bros., Inc.
v.
J. W. Construction
Judgment
Amount: \$19,213.05
Filed: 1/14/72
17.
Industrial Commissioner
v.
J. W. Construction Corp.
N.Y.S. Tax Warrant & Lien
Amount: \$627.87
Filed: 1/20/72
18.
U. S. A.
v.
J. W. Construction Corp.
Federal Tax Lien
Collector's Serial #16752
Amount: \$16,302.71
File #4272
Filed: 2/18/72
19.
Tri-Co Electric Corp.
v.
J. W. Construction Corp.
Judgment
Amount: \$24,818.90
Filed: 2/28/72
20.
Peter Annis, Inc.
v.
J. W. Construction Corp.
Judgment
Amount: \$6,209.00
Filed: Mar. 1, 1972"

The following items constitute the most relevant facts analysis of which are necessary for decision:

<u>LIENS FILED</u>	<u>FILING DATE:</u>
#5 Federal Tax Lien	6/3/71
#6 Judgment of Mid-Hudson	7/26/71
#9 Federal Tax Lien	8/26/71
#15 Federal Tax Lien	12/31/71
#18 Federal Tax Lien	2/18/72
SUBSEQUENT PROCEEDINGS:	
#1. Execution issued by judgment creditor, Mid-Hudson to Orange County Sheriff	8/30/71
#2. Notice of seizure posted by I.R.S.	9/9/71
#3. Notice of levy posted by Orange County Sheriff	10/4/71
#4. Orange County Sheriff's Sale (Plaintiff successful bidder)	3/7/72
#5. I.R.S. sale (sealed bids - high bid of \$31,010.00 by Wilkin)	4/17/72
#6. Orange County Sheriff's deed to plaintiff	5/18/72

QUESTIONS PRESENTED

1. Is the intervenor's claim barred by the statute of limitations by reason of its failure to commence any proceeding within the time specified by Section 6532(c) (1) of the Internal Revenue Code of 1954, as amended?
2. Are the intervenor and the defendant estopped from contesting the validity of the Sheriff's Sale by reason of intervenor's being the party who initiated same and by reason of the defendants failure to redeem in accordance with Section 2410, U. S. Code, Title 28?
3. Does alleged prior posting of a notice of seizure by representatives of I.R.S. at the situs of the delinquent taxpayer's real property and subsequent posting by representatives of the Orange County Sheriff's Department at the situs of the judgment debtor's real property have any effect on the priority of lien established by the applicable provisions of 26 U.S.C.A. (I.R.C. 1954) Sections 6321, 6322 and 6323, and Sections 5203 and 5236 of the Civil Practice Law and Rules of the State of New York, so as to render a sale pursuant to execution held by the Orange County Sheriff on March 7, 1972, a nullity thereby depriving the purchaser at that sale of his right to surplus monies created by the subsequent non-judicial federal tax lien sale held on March 17, 1972?
4. Do the provisions of 26 U.S.C.A. (I.R.C. 1954) Sections 6321, 6322, 6323, and 7425(b) and provisions of Sections 5203

and 5236 of the Civil Practice Law and Rules and Section 240 of the Lien Law of the State of New York establish record priority of lien so that the sale, pursuant to execution by the Orange County Sheriff enforcing the judgment lien of judgment creditor, Mid-Hudson Painting and Decorating Co., extinguished all subsequently filed federal tax liens and entered judgment liens?

5. Did I.R.S. receive the required notice necessary to extinguish the federal tax liens filed subsequent to the judgment of Mid-Hudson Painting and Decorating Co.?

6. Is the plaintiff, as the purchaser of the interest of J. W. Construction Corp. at the execution sale conducted by the Orange County Sheriff on March 7, 1972, entitled to the surplus money arising from the federal tax lien sale conducted on March 17, 1972, as the owner of the equity of redemption?

POINT I

INTERVENOR'S CLAIM TO THE SURPLUS MONEY
IS BARRED BY THE STATUTE OF LIMITATIONS

Section 6532(c)(1) of the Internal Revenue Code of 1954, as amended, states that no suit or proceeding under Section 7426(a)(2) of the Code shall be begun after the expiration of nine months from the date of the levy or agreement giving rise to such action. Here, the levy was made on February 17, 1972, and the sale conducted on March 17, 1972. The intervenor falls under the category of a person, other than a taxpayer seeking a refund and seeking a share of surplus proceeds pursuant to Section 7426(a)(2), supra, who was required to bring suit not later than November 17, 1972, Section 6532(c)(1), supra. Although the plaintiff commenced a timely action, as to the intervenor, the limitation period has run. Despite this, intervenor has attempted to avoid the nine month limitation period and take advantage of the plaintiff's timely institution of suit by its motion to intervene (motion papers dated February 15, 1973).

The plaintiff's action cannot be categorized as a true, hybrid or spurious class action, as his claim is his alone and is one specifically allowed by Section 7426(a)(2), supra. The plaintiff claims his position as the owner of the equity of redemption of J. W. Construction Corp., and as such is solely entitled to the surplus proceeds. On the other hand, the intervenor is a judgment lien creditor whose status is readily distinguishable from that of the plaintiff. The respective claims are completely adverse,

antagonistic and prejudicial to each other. Under no stretch of the imagination do they enjoy any similarity or identity of interests. A determination in favor of one will necessarily interfere with and be to the detriment of the other.

The intervenor's remedy was by separate action in accordance with Sections 7426 and 6532 supra. Having failed to timely bring such action, any claim the intervenor might have had has been barred.

POINT II

INTERVENOR AND DEFENDANT ARE ESTOPPED FROM
CONTESTING THE VALIDITY OF THE SHERIFF'S SALE

The Sheriff's Sale now being attacked was brought about by the intervenor issuing an execution to the Orange County Sheriff and arranging for the sale of the debtor's real property.

It was the intervenor who failed to serve notice of the sale upon the Internal Revenue Service so as to wipe out the liens of all except the first filed federal tax lien. It was also the intervenor who decided not to bid at the Sheriff's Sale, despite the fact it could have bid up to the amount of its judgment without having to pay any money. Accordingly, based upon the aforesaid actions of the intervenor, and the long delay before any proceeding was commenced, intervenor should be estopped from contesting the validity of the Sheriff's Sale it brought about. Both the New York courts and Federal courts applying state law have consistently held that equity will deny aid to one who has participated in an execution or judicial sale, or who has waived the right to raise alleged irregularities therein by reason of the passage of time. *Shaker Central Trust Fund v. Crusade for Christ, Inc.*, 227 N.Y.S.2d 691, 16 A.D.2d 584, Affd. 233 N.Y.S.2d 479, 12 N.Y.2d 696; 2 ALR2d 6.

The defendant, United States of America, could have redeemed the property of J. W. Construction Corp. purchased

by the plaintiff at the Orange County Sheriff's Sale, and thereby eliminated any interest of the plaintiff in the property, or any claim by the plaintiff to the surplus at the subsequent I.R.S. sale. U.S.Code, Title 28, Section 2410. Therefore, the defendant, should also be estopped from contesting the plaintiff's claim to the surplus monies.

Even if the sale was irregular, it would not be void, and title would pass thereunder. *Cunningham v. Cassidy*, 17 N.Y.276. Such a sale is voidable only upon due and timely application to set it aside. *Harris v. Murray*, 28 N.Y.574. In the present case, neither intervenor nor the defendant has commenced any proper proceeding to set aside the sale.

POINT III

THE VALIDITY OF THE SHERIFF'S SALE IS GOVERNED BY NEW YORK LAW.

Although the plaintiff brought this action in the United States District Court, against the United States of America, in accordance with the requisite federal statutes, New York Law should be applied to determine the validity of the Sheriff's Sale as between private (as opposed to Federal) lienors. If the United States was not a party, and lacking diversity, this action would be heard and determined in the New York State Courts under New York State Law.

In U.S. v. Brosnan, 363 U.S.237, the Supreme Court held that the divestiture of a tax lien is governed by local law because Congress has not provided otherwise. The 1966 amendments to the Internal Revenue Code accepted the proposition that tax liens may be discharged by a nonjudicial or judicial sale, but that such discharge is conditioned upon notice to the government. Section 6323(a) and 7425(b) of the Internal Revenue Code and New York CPLR Section 5203 govern the procedure necessary to extinguish federal tax liens and other judgment liens and incumbrances. (See also Rabkin & Johnson, Federal Income, Gift & Estate Taxation, Section 7306(4)).

Where a federal tax lien has priority over the judgment that was the basis of the sale, Section 2410(b) of the United States Code, Title 28, provides that such a sale shall be subject to the lien of the United States. In a situation

where the sale is to satisfy a lien filed prior to the lien of the United States, said section provides that the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the Internal Revenue Code, the period shall be 120 days or the period allowable for redemption under State law, whichever is longer.

Certainly, if the only liens against the property of the debtor were federal tax liens, and after seizure of the debtor's real property, but before sale by the I.R.S., the debtor sold whatever interest he had in said seized real property, the purchaser would be entitled to any surplus resulting from the I.R.S. sale after satisfaction of the federal tax liens.

POINT IV

THE SHERIFF'S SALE WAS HELD IN ACCORDANCE WITH NEW YORK STATE AND FEDERAL LAW, AND PLAINTIFF BECAME THE OWNER OF THE EQUITY OF REDEMPTION BY REASON THEREOF.

The Sale held by the Orange County Sheriff was in accordance with the applicable provisions of Section 5236 of the New York Civil Practice Law & Rules, and was in all respects valid, subject to the priority provisions of Section 6323(a) and 7425(b) of the Internal Revenue Code. It wiped out all judgments and liens filed subsequent to the intervenor's judgment that was the basis of said sale. As successful bidder, the plaintiff became the owner of the equity of redemption and entitled to whatever it was worth, no matter how small. Plaintiff, as purchaser, took subject to claims with priority, and the surplus money resulting from the subsequent I.R.S. sale belongs to him.

As the owner of the equity of redemption, the plaintiff, if he chose, could have redeemed in full by paying the amount owed on the federal tax lien, and become the absolute owner of the property of J. W. Construction Corp., subject to all prior liens and encumbrances enjoying superiority to federal tax lien #5. 26 U.S.C.A. (I.R.C.1954) Section 6337(b).

By choosing not to exercise the right of redemption, the plaintiff became entitled to whatever surplus proceeds arose from the I.R.S. sale.

The situation in this case is analogous to the situation where a second mortgagee forecloses his mortgage on real property, and thereafter or while same is in progress, a

prior lien or the first mortgage is foreclosed. The purchaser at the first sale would be entitled to any surplus money resulting from the second sale as the owner of the equity of redemption. *Davison v. MacDonald*, 124 Misc.726, 209 N.Y.S. 145, Aff'd. 216 A.D.759, 214 N.Y.S.825. See also *Carmody Wait 2d*, Sections 92:427 and 92:434.

The money realized as the result of the execution sale by the Sheriff retains the nature of realty and the valid liens against real property sold are transferred to the money. *Barbaro v. Maher*, 56 Misc.2d 650, 289 N.Y.S.2d 719. The sale conveys the realty to the purchaser free of all judgment liens outstanding against the judgment debtor.

Section 5203(a)(3) N.Y.C.P.L.R.; *First Federal Savings and Loan Association of Port Washington v. McKee*, 61 Misc.2d 693, 305 N.Y.S.2d 589. Thus, the plaintiff as the purchaser of the interest of the judgment debtor, J.W. Construction Corp., acquired his interest in the real property free of all liens subsequent to the judgment lien of Mid-Hudson (#6), but subject to all prior liens and encumbrances of record, one of which was the federal tax lien #5. Federal tax liens #9, #15, and #18, were properly extinguished and discharged by the sale pursuant to execution in accordance with the priority provisions of Section 6323(a) and 7425(b) of the Code, as were all other judgment liens and encumbrances under Section 5203 N.Y. C.P.L.R. Similarly, a judicial sale against the United States shall have the same effect respecting the discharge of the property from liens and encumbrances held by

the United States as may be provided with respect to such matters by local law of the place where the property is situated. Kohlman v. Alexander, 1 A.D.2d 334, 150 N.Y.S.2d 134; Dime Savings Bank of Brooklyn v. Sherman, 64 Misc.2d 457, 314 N.Y.S.2d 86. Also see 28 U.S.C.A. Section 2410.

The rule of caveat emptor applies to the actions of the purchaser at any public auction and it is important that when he makes his bid at an execution sale, he ascertain the condition of the title before he bids. Under New York law the Sheriff can sell only such interest as the judgment debtor had in the property. Therefore, the plaintiff purchaser could only obtain the judgment debtor's interest in the property subject to all prior liens and encumbrances of record to the judgment lien had by the judgment creditor, Mid-Hudson. The purchaser's bid and purchase was at his own peril. This accounts for the few number of bidders. At the time of the bid, the judgment debtor, J. W. Construction Corp., had little or no equity. The records at the Orange County Clerk's Office fully substantiated that fact. To further enforce this, representatives of the I.R.S. had announced existing federal tax liens and the proposed sale on March 17, 1972, of the interest of J.W. Construction Corp. for unpaid federal taxes. Examination of the record disclosed that the completion of the judgment execution sale would extinguish all subsequent liens and encumbrances but would not extinguish all prior liens and encumbrances. The plaintiff, when bidding, took this into consideration.

POINT V

THE PLAINTIFF IS ENTITLED TO ALL SURPLUS
PROCEEDS RESULTING FROM THE I.R.S. SALE,
AFTER PAYMENT OF THE BALANCE DUE ON
FEDERAL TAX LIEN #5.

The Sheriff's Sale wiped out the liens of all judgments and liens filed subsequent to Judgment #6. Accordingly, the only federal tax lien to be satisfied from the proceeds of the I.R.S. sale thereafter held was federal tax lien #5.

At best, I.R.S. may claim improper notice of the Sheriff's Sale as to the second and third (#9 and #15) federal tax liens, and that those liens were not wiped out by the Sheriff's Sale. It is conceded by the United States Attorney's Office that if the Sheriff's Sale is held valid, no notice was required as to the fourth (#18) federal tax lien because of the date it was filed. As to the second and third (#9 and #15) federal tax liens, the plaintiff contends that the actual notice of the Sheriff's Sale admitted by I.R.S., and their presence at the sale, is adequate notice.

Federal taxes remaining unpaid after demand shall be a lien in favor of the United States upon all real and personal property of the taxpayer as of the time of the assessment, but such lien shall not be valid against any mortgagee, pledgee, purchaser, or judgment creditor unless duly filed. 26 U.S.C.A. (I.R.C. 1954) Sections 6321, 6322 and 6323. It is also clearly established that first in time is first in right with respect to priority of liens for federal, state,

local taxes, assessments and water rates. *United States v. New Britan*, 347 U.S.81, 74 S.Ct. 367, 98 L.Ed. 520; *Day v. Newlots*, 107 N.Y.148, 13 N.E.915.

According to Section 6322, when the tax is assessed the tax lien arises, but as against the specific interest mentioned in Section 6323(a) (mortgagees, pledgees, purchasers and judgment creditors) it is not valid until placed on public record. *Southold Savings Bank v. Finkelstein*, 40 Misc.2d 381, 243 N.Y.S.2d 397. We are dealing with a statutory lien concerning nonpayment of federal taxes established under federal law, and a statutory lien concerning the lien of a properly entered judgment under the law of the State of New York. As between statutory liens, a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds. *Southold Savings Bank v. Finkelstein*, *supra*.

The United States of America was entitled to its lien for unpaid taxes against real and personal property owned by the delinquent taxpayer J.W. Construction Corp. The lien arose upon its assessment, but did not properly become choate, or otherwise stated, perfected, with respect to those persons excepted by Section 6323(a) until filed in the Orange County Clerk's Office. The judgment creditor, Mid-Hudson, is one of those persons entitled to priority resulting from its previously entered judgment lien. The judgment lien of Mid-Hudson (#6) has priority to Federal Tax Liens #9, #15, and #18, but is subject to Federal Tax Lien #5.

The nature, scope and operation of the federal tax lien is a matter of federal law. Unless expressly excluded, all of the property of the taxpayer is within its scope. *United States v. Security Trust and Savings Bank of San Diego*, 340 U.S. 47, 71 S.Ct. 111, 95 L.Ed. 53. But, property rights have been declared to be a matter of state law. *United States v. Bess*, 357 U.S. 51, 78 S.Ct. 1054, 2 L.Ed. 1135; *Mintz v. Fischer*, 35 Misc.2d 713, 231 N.Y.S.2d 173, 19A.D.2d 36, 240 N.Y.S. 2d 649; *Harman v. Fairview Associates*, 30 A.D.2d 492, 294 N.Y.S. 2d 442; 26 U.S.C.A. (I.R.C.1954) Sections 6321, 6323(a,f) and 7425(b); and Section 240 of the Lien Law of the State of New York. The priority of a lien created by state law depends on the time it attached to the property in question and became choate or perfected, Section 5203(a) N.Y. C.P.L.R. The federal tax liens became choate or perfected when notice of those liens were properly filed in the Orange County Clerk's Office. 26 U.S.C.A. (I.R.C.1954) Section 6321 and 6323(a). Similarly, the lien of the judgment held by Mid-Hudson became choate or perfected upon its entry in the dockets maintained by the Orange County Clerk. Section 5203(a) N.Y. C.P.L.R. Priority of each lien is then determined under the applicable provisions of the federal law and the state law. 26 U.S.C.A. Sections 6321, 6323(a) 6323(f) and 7425(b); *Aquilino v. United States*, 363 U.S. 509, 80 S.Ct. 1277, 4 L.Ed.2d 1365; and same case 10 N.Y.2d 271, 219 N.Y.S.2d 254; *United States v. Mark Alpha Brickwork Co.*, D.C., 202 Supp. 673; and *United States v. Chapman*, 10 Cir., 281 F.2d

862. The controlling sections and cases are clear. First in time first in right is the manner in which priority is determined. When a state lien has been properly perfected and is first in time, it defeats a later arising or later perfected federal lien. *Aquilino v. United States*, supra; *United States v. New Britan*, supra; *United States v. Security Trust and Savings Bank of San Diego*, supra; *Crest Finance Company v. United States*, 368 U.S. 347, 82 S.Ct. 384, 7 L.Ed.2d 242. Also, see Section 240 of the Lien Law of the State of New York.

CONCLUSION

THE PLAINTIFF IS ENTITLED TO THE
ENTIRE AMOUNT OF SURPLUS PROCEEDS.

The plaintiff is entitled to the entire amount of surplus proceeds. Federal tax liens #9, #15, and #18, were properly extinguished and discharged by the Sheriff's Sale on March 7, 1972, pursuant to execution issued by Mid-Hudson Painting and Decorating Co., as were all other liens and encumbrances of record subsequent to the underlying judgment lien #6. The federal tax lien sale on March 17, 1972, created surplus proceeds after the monies realized from the sale were applied to whatever indebtedness was due to the defendant by virtue of federal tax lien #5.

As of the date of this memorandum, the defendant has failed to account for the amount claimed to be due and owing on federal tax lien #5. After this amount is disclosed and subjected to review, it must be deducted from the received purchase price of \$31,010.00, leaving a balance of surplus proceeds which is to be paid to the plaintiff with applicable interest.

Respectfully submitted,

BAUM & GERSTEN, ESQS.
Attorneys for Plaintiff
15 Hamilton Avenue
Monticello, New York, 12701
(914) 794-5641

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MORTON I. BAUM,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

James A. Steele

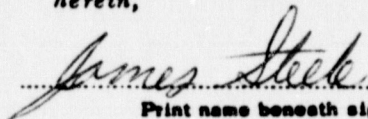
being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.That on the 15th day of September 1975 at 1 St. Andrews Plaza, N. Y., N. Y.deponent served the annexed *Brief*

upon

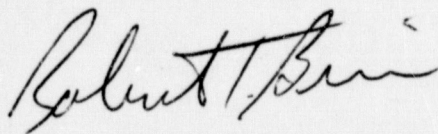
Asst. U.S. Attorney for the Southern District of N. Y.

William R. Bronner for Paul Curran, U.S. Attorney

the Attorney in this action by delivering a true copy^{ES} thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,Sworn to before me, this 15th
day of September 1975

Print name beneath signature

JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MORTON I. BAUM,

Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.

Index No.

Affidavit of Service by Mail


STATE OF NEW YORK, COUNTY OF NEW YORK

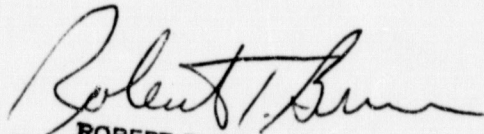
SS.:

I, **Eugene L. St. Louis** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1235 Plane Street, Union, N.J. 07083
That on the 15th day of September 1975, deponent served the annexed Brin
upon **Lawrence X. Kennedy** attorney(s) for
in this action, at **1 Harriman Square, Goshan, N.Y. 10924**

2 85 the address designated by said attorney(s) for that
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 15th
day of September 1975.


Print name beneath signature
EUGENE L. ST. LOUIS


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977